APPENDIX A

[110]

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 46
Miscellaneous Docket No. 12
Original Jurisdiction

GEORGE HYAM, LINFORD C. SCHMOYER, JOHN SHUTE, JR., MAR-PETH LAND CO., INC., LAWRENCE I. YERK, CHARLES B. WEYAND, PAUL L. OSTERBERG, BERNARD M. MEILE, W. A. STOTTLEMIRE, CARL WEBER, MAZIE GERY, HARVEY S. HOLT, AND JAMES A. HILDEBRANT,

v.

UPPER MONTGOMERY JOINT AUTHORITY, BOROUGH OF EAST GREENVILLE, BOROUGH OF PENNSBURG AND BOROUGH OF RED HILL

Opinion of the Court

JONES, B. R., J. FILED: April 26, 1960

On March 21, 1960, thirteen owners of realty in the Boroughs of East Greenville, Pennsburg and Red Hill, Montgomery County, instituted an equity action in the Court of Common Pleas of Montgomery County against the aforesaid Boroughs and the Upper Montgomery Joint Authority[1] to restrain them, jointly and severally, from proceeding with a contemplated construction and financing of a sewage collection system, a sewage treatment plant and other related sewer facilities "in and adjacent to and for rendering service in and for" the said Boroughs.

[1] This Authority was created by the three Boroughs under the provisions of the Pennsylvania Municipal Authority Act of May 2, 1945, P. L. 382, as amended and supplemented, 53 P. S. § 301 et seq.

[110-2] On March 31, 1960 the Authority and three Boroughs filed preliminary objections in the nature of a demurrer to the property owners' complaint.

On the same date the Authority and three Boroughs filed a petition in this Court requesting that we take original jurisdiction of the proceeding. Upon answer being filed to that petition, on April 4, 1960, in view of the importance of the questions involved, we directed the issuance of a special certiorari to the Court of Common Pleas of Montgomery County removing therefrom the record and all papers in the proceedings to this Court "for consideration and action thereon as if said case were [before this Court] on original jurisdiction".[2] Such is the present posture of this litigation.

The instant matter is presented upon the pleadings, i.e., the complaint and the preliminary objections thereto in the nature of a demurrer. In passing upon the validity of these preliminary objections certain well-established principles are applicable: (1) preliminary objections admit as true only such facts as are well pleaded, material and relevant and only such inferences as are reasonably deducible from such facts: *Adams* v. *Speckman*, 385 Pa. 308, 122 A. 2d 685; *Gardner* v. *Allegheny County*, 382 Pa. 88, 114 A. 2d 491; *Byers* v. *Ward*, 368 Pa. 416, 84 A. 2d 307;

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[2] Article V, Section 3, of the Pennsylvania Constitution vests in this Court "original jurisdiction in cases of injunction where a corporation is a party defendant" and such jurisdiction extends to corporations municipal in nature: *Wheeling* v. *Philadelphia*, 77 Pa. 238; *DeWalt* v. *Bartley*, 146 Pa. 525, 23 A. 448; *Bruce* v. *Pittsburgh*, 161 Pa. 517, 29 A. 584; *Hoffman* v. *Pittsburgh*, 229 Pa. 36, 78 A. 26; Raff v. Philadelphia, 256 Pa. 312, 100 A. 815; *Wentz* v. *Philadelphia et al.*, 301 Pa. 261, 151 A. 883; *Mistick* v. *Cammack*, 397 Pa. 296, 154 A. 2d 588. The acceptance of such jurisdiction is a matter solely discretionary with this Court: *Clark* v. *Washington Borough*, 145 Pa. 566, 23 A. 333; *Wentz* v. *Philadelphia*, supra; *Commonwealth ex rel. Paylor* v. *Claudy*, 366 Pa. 282, 77 A. 2d 350; *Mistick* v. *Cammack*, supra.

(2) pre- [110-3] liminary objections admit neither conclusions of law nor inferences unwarranted by the admitted facts nor argumentative allegations nor expressions of opinion: *Adams* v. *Speckman*, supra; *Detweiler* v. *Hatfield Joint School District*, 376 Pa. 555, 104 A. 2d 110; *Byers* v. *Ward*, supra; *Kaufman* v. *Kaufman*, 222 Pa. 58, 70 A. 956; (3) if to sustain the preliminary objections of a defendant will result in a denial of a plaintiff's claim or a dismissal of plaintiff's suit, such preliminary objections will be sustained only in those cases which are clear and free from any doubt: *Adams* v. *Speckman*, supra; *Sun Ray Drug Co.* v. *Lawler*, 366 Pa. 571, 79 A. 2d 262; *Davis* v. *Investment Land Co.*, 296 Pa. 449, 146 A. 119.

The complaint of the realty owners contains 18 paragraphs. Paragraphs 1 to 5, inclusive, describe the plaintiff property owners and the corporate defendants. Paragraph 6 avers that the three Boroughs on March 7, 1960, by ordinances simultaneously adopted, approved an agreement entered into on March 3, 1960 by the three Boroughs with the Authority for the construction of a sanitary sewage collection system, a sewage treatment plant and other related sewer facilities in said Boroughs. Under this agreement the Authority was to effect the construction of this project and the three Boroughs were to ensure that abutting property owners would connect with the sewer system and would grant certain easements and rights of way to the Authority. Paragraph 7 recites that, prior to the adoption of these ordinances, the three Boroughs, simultaneously on February 8, 1960, adopted certain ordinances. These ordinances approved the Authority's plan of construction,[3] approved the estimated cost of said sewer facilities assessable in each of the three Boroughs and [110-4] the aggregate estimated cost of the entire system

[3] A plan dated January 25, 1960 which had been prepared and submitted to the Authority by a certain named firm of consulting engineers.

and, further, approved the Authority's proposal to charge approximately $886,264 of the total aggregate cost against properties benefited, improved and accomodated thereby, said assessment to be in accordance with the foot front rule. Paragraph 8 avers that the Authority's engineers' report described the proposed sewer system as designed to serve 1534 presently existing dwelling units and projected a total estimated cost for the construction and financing of said sewer facilities at $2,592,000 and an estimated average annual sewer rental per dwelling unit of $69.40.

Paragraphs 9 to 12, inclusive, set forth a history of the events which preceded the adoption of the Boroughs' ordinances. The three Boroughs on February 24, *1947* had engaged the same firm of consulting engineers to make a preliminary survey and study of the collection and disposal of sewage from the tri-borough area and such written survey and study was prepared and submitted to the three Boroughs on July 9, 1947. This survey and study estimated a total cost of $763,000 for the construction of the sewer facilities to serve 1259 then existing dwelling units at an average annual rental per dwelling unit of $39.40 and said survey and study suggested that, in view of the then high construction costs, it was inadvisable at that time to proceed with the construction of the sewer facilities. Eleven years later—1958—the three Boroughs received from the same firm of consulting engineers another estimated cost of the construction and financing of sewer facilities to serve 1463 then existing dwelling units at $1,950,000 at a average annual rental per dwelling unit of $49.95.

Paragraph 13 sets forth that, on February 5, 1960 at a [110-5] public meeting, a representative of the same firm of consulting engineers explained that the discrepancy between its estimates of construction and financing costs in 1947 and in 1960 was due to the fact that the system proposed in 1947 was designed for an ultimate 5000 dwelling

units, while the system proposed in 1960 envisioned an ultimate 6000 dwelling units.

Paragraph 14 avers that the property owners then engaged their own consulting engineers. These engineers have advised that the Authority's proposed sewer system (a) is not economically feasible, (b) does not propose a complete sewer system and (c) will only partially abate sewage discharge into waters of the Commonwealth. Furthermore, these engineers advised that the contemplated construction and financing of this project would place an unnecessary and unjustifiable burden upon a majority of the property owners for the benefit of a relatively few property owners whose sewage may have been polluting waters of the Commonwealth; that a third pumping station to eliminate the pollution of waters of the Commonwealth (proposed to be constructed within three years) would require additional sewer facilities presently not economically feasible and impossible to accomplish within the three year period; that the average property owner in the tri-borough area—with an average annual income of $3,800—cannot financially bear the estimated initial expense of $1,000 in addition to the estimated annual minimum sewage rental of $69.40.

Paragraph 15 avers that, when the property owners attempted to bring to the attention of the Authority and the Boroughs the discrepancies in cost (1947, 1958 and 1960) and to obtain a reconsideration of their approval of the engineers' report and the consideration of other alternatives, the Authority and the Boroughs insisted [110-6] that any further investigation be set aside, that the proposed plan of sewer construction be "immediately and arbitrarily approved", and that the Authority, by letter, threatened the plaintiffs and other property owners that, in the event they persisted in legal action, the Authority would hold them responsible, jointly and severally, for damages. Paragraph 16 avers that the Authority has

obtained bids for the sale of bonds for financing the construction of the proposed projects and either has sold or is about to sell such bonds and to award contracts for the construction.

Paragraphs 17 and 18 aver that "defendants have been guilty of a manifest abuse of the legal discretion vested in them [legally] * * *, * * * they have acted arbitrarily, unreasonably, capriciously and not in good faith, so that their decisions and actions * * * have been and are of an unlawful nature * * *" and that, unless defendants are now restrained, immediate, severe and irreparable damage will be caused the property owners.

The preliminary objections raise principally two contentions: (1) that the complaint does not set forth a cause of action; and (2) that the property owners are guilty of laches.

Consideration of the pleadings is rendered more understandable by an examination of the factual background of this controversy as presented by the petition seeking our assumption of original jurisdiction and the answer thereto. In October, 1946 the Sanitary Water Board of the Commonwealth ordered the three Boroughs to either abate the discharge of sewage into waters of the Commonwealth or to submit, jointly or severally, on or before July 1, 1947, a comprehensive sewer plan to the Board for its approval. On or about July 9, 1947 a firm of consulting engineers employed by the three Boroughs rendered a [110-7] preliminary report of a survey and study which it had undertaken and, subsequent thereto, a public meeting was held under the auspices of the East Greenville Borough for a full discussion of the engineers' report. At a later hearing before the Board one of the matters discussed was the problem of sub-surface drainage in the Borough which rendered impossible private abatement of sewage discharge into Commonwealth waters.

Beginning in November, 1959 the Authority publicly advertised for bids for the construction of the sewer system and, pursuant to such advertising, seven bids were received from general contractors. On December 21, 1959 the Authority's consulting engineers reported that the overall cost of the coordinated sewage system, based upon the actual bids received, would be $2,022,447.83.[4] The Federal government has made available to the Authority for this project funds not to exceed $250,000.

The Authority has entered into a contract for the construction of the sewer system, has sold its bonds, as of January 20, 1960, and the bonds were due for delivery on March 29, 1960 but due to this litigation delivery of the bonds has not been made.

On February 5, 1960 at the request of counsel for certain property owners [not the present counsel for the instant property owners] a public meeting was held at which questions were addressed to a panel concerning the proposed construction and financing of the sewer system. This panel was composed of representatives of the Commonwealth's Department of Health, of the Authority's engineers, of bond counsel, of the Authority and the Boroughs, and of the bond [110-8] underwriters.

Three days later three of the present plaintiffs, together with nineteen other property owners, instituted an equity action in the Court of Common Pleas of Montgomery County against the Authority and the Boroughs to restrain the construction of the sewage system. Preliminary objections to this complaint were filed. *On February 11, 1960 in open court the property owners withdrew their action.* It was not until the withdrawal of this action that the Authority entered into the construction contract, ac-

[4] It should be noted that the property owners aver that, on January 25, 1960, the engineers reported an overall cost of $2,579,547.88.

cepted the Federal grant and scheduled a date for the delivery of the bonds.

Subsequent to these events the present action was filed.

Does this complaint present a justiciable cause of action? Our analysis of its allegations indicates that it does not. With one exception, infra, the property owners' accusations are generalities and conclusions unsupported by factual averments. Allegations that the proposed sewer plan is economically not feasible, incomplete and will result in the imposition of an unnecessary and unjustifiable burden on the property owners in the tri-borough area find no support in the facts averred in this complaint. Assuming the truth of all the well pleaded, material and relevant facts and inferences reasonably deducible therefrom, such facts and inferences do not establish any such abuse of discretion or arbitrary and capricious action on the part of these municipal officials such as warrants judicial interference. *Nowhere in the proceeding is there any allegation of any fraud or misconduct on the part of these municipal officials.* Cf.: *Mistick* v. *Cammack*, supra.

The thrust of the property owners' accusations is that the Authority's consulting engineers estimated the cost of the proposed construction in 1946 at $763,000 whereas the same engineers, in 1960, estimated the cost of the proposed construction at $2,592,000. However, [110-9] taking into consideration the larger number of dwelling units to be serviced, the tremendous and unprecedented rise in the cost of construction of *any* project during the fourteen year period between 1946 and 1960 and other factors, the increase in the estimated costs of this project between 1946 and 1960 does not, standing alone, justify our interposition in this matter.

The property owners want a hearing.[5] Even if such

[5] If a hearing were to be held the matter would be remanded for that purpose to the court below.

hearing were held and *all* the facts *alleged* in the complaint were *proven*, judicial interference would be unwarranted. The legislature has vested in both the Authority and the Borough officials the power and responsibility of conducting governmental affairs in their respective areas: to such officials on the local level is given the right to exercise both judgment and discretion within the sphere of the legislative grant. Courts should be loathe to interfere with or control the performance of the duties of such municipal officials: fraud, official misconduct, arbitrary and capricious abuse of power or discretion by municipal officials alone justify judicial intervention.

Such a doctrine finds support in prior decisions of our Court. In *Blumenschein* v. *Pittsburgh Housing Authority*, 379 Pa. 566, 572, 109 A. 2d 331, Chief Justice Horace Stern, speaking for this Court, stated: "By a host of authorities in our own and other jurisdictions it has been established as an elementary principle of law that courts will not review the actions of governmental bodies or administrative tribunals involving acts of discretion, in the absence of bad faith, fraud, capricious action or abuse of power; they will not inquire into the wisdom of such actions or into the details of [110-10] the manner adopted to carry them into execution. It is true that the mere possession of discretionary power by an administrative body does not make it wholly immune from judicial review, but the scope of that review is limited to the determination of whether there has been a manifest and flagrant abuse of discretion or a purely arbitrary execution of the agency's duties or functions. That the court might have a different opinion or judgment in regard to the action of the agency is not a sufficient ground for interference; *judicial* discretion may not be substituted for *administrative* discretion." In *Neizer* v. *Schuylkill Township School District et al.*, 384 Pa. 323, 121 A. 2d 93, our present Chief Justice, speaking for a unanimous Court, approved an opinion of the Chester County Court of Common Pleas which read, in

part, as follows: "The Board of the School District is the Authority vested with the duty of saying what facilities are adequate and proper for the needs of the School District. What are adequate and proper facilities is a matter of opinion about which reasonable people may differ. Because these plaintiffs are of the opinion that the defendants built too large or elaborate a structure is no reason for holding that they were guilty of bad faith." In *Nine-Ten Chestnut Corporation* v. *Philadelphia Parking Authority*, 373 Pa. 274, 95 A. 2d 553, we held that a court has no authority to overrule a determination made by an authority to construct a particular parking garage, at least in the absence of any accusation of fraud or misconduct or facts indicating arbitrary or capricious conduct on the part of the Authority. In *Parker* v. *Philadelphia*, 391 Pa. 242, 137 A. 2d 343, Mr. Justice Chidsey, speaking for this Court, stated: "It is not sufficient that appellants disagree with the *wisdom* of the City Council's action. A court of [110-11] equity will not substitute its determination of what may be wise for the decision of the appropriate governmental body, absent a showing of bad faith, abuse of power, etc." (P. 249).

We have long recognized a presumption that municipal officers properly act for the public good: *Parker* v. *Philadelphia*, supra; *Downing* v. *Erie City School District et al.*, 362 Pa. 29, 61 A. 2d 133; *Gericke et al.* v. *Philadelphia et al.*, 353 Pa. 60, 44 A. 2d 233. Presumptively, these officials must be regarded as acting properly and for the public good. Absent any allegations in this complaint of either fraud or misconduct and absent any allegations of fact which would indicate that these municipal officials have acted or are acting either in abuse of their power or in a capricious or arbitrary manner, judicial intervention cannot be justified. To label the actions of these officials as capricious or arbitrary does not make them so. A hearing might indicate that the proposed plan is not as complete as it might be, that it involves a greater expenditure of

money than the results would justify or that it was unwise at this time to enter upon such a plan. However, the determination of such facts has been placed in the first instance in the discretion and judgment of the Authority and Borough officials and upon them has been placed responsibility under the law for such determination and judgment. Unless it can be shown—and the facts alleged in the complaint, even if proven, do not so show—that the discretion and judgment of such officials have been motivated by fraud or by complete lack of responsibility or by arbitrary considerations or capricious beliefs, no court should substitute its judgment for that of such officials. To do so would constitute an unwarranted judicial interference with the duties of duly appointed and elected public officials.

[110-12] Even if the property owners proved all the facts set forth in their complaint, as distinguished from the conclusions of law, such facts do not show such conduct on the part of the municipal officials as to justify our interference with their discretion and judgment.

In view of the conclusion which we have reached, it is unnecessary to consider the question whether the property owners are guilty of laches under the circumstances.

The preliminary objections are sustained and the complaint dismissed with prejudice at plaintiffs' costs.

Pertinent Docket Entries

April 18, 1960, argued.

April 26, 1960, the preliminary objections are sustained and the complaint dismissed with prejudice at plaintiffs' costs.

Jones, B. R., J.

May 5, 1960, petition of plaintiffs for reargument filed.

May 18, 1960, answer of defendants to petition for reargument filed.

Order

May 26, 1960

Petition Denied
Per Curiam

COMMONWEALTH OF PENNSYLVANIA }
SUPREME COURT—EASTERN DISTRICT } ss:

I, Charles H. McKibben Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern District thereof, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct copy of the whole and entire Opinion of the Court and pertinent Docket Entries in the case of George Hyam et al. v. Upper Montgomery Joint Authority, et al. at No. 46 Misc. Dkt. No. 1 as full, entire and complete as the same remains on file in the said Supreme Court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the Prothonotary of said Court, and that the foregoing is a correct transcript from said record and of the whole of the original thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court, at Philadelphia, in the County of Philadelphia, in the said Eastern District of Pennsylvania, this First day of June in the year of our Lord One Thousand Nine Hundred and Sixty.

(SEAL)

Prothonotary

APPENDIX B

UPPER MONTGOMERY JOINT AUTHORITY
Serving the Boroughs of East Greenville, Pennsburg, Red Hill

John F. Keelor, President
Wilmer G. Dimmig, Vice President
Clarence R. Richard, Secretary

R. B. Erb, Treasurer
Foster C. Hillegass, Ass't Treasurer
Forrest J. Beyer, Ass't Secretary

NOTICE

February 10, 1960

Mr. Harold M. Romeike
201 West 8th St.
Pennsburg, Pennsylvania

Dear Mr. Romeike

This letter is to acknowledge the Complaint in Equity instituted in your name, and to give you the following notice.

As you undoubtedly know, the proposed sewage system represents the product of ten years careful and extensive planning and development by representatives of the participating municipalities who have had the benefit of exhaustive studies by engineers and legal counsel.

At considerable expense an authority was formed to construct and operate the sewage collection system and treatment plant and to finance the construction by issuing bonds. The plan has been approved by all governmental agencies having jurisdiction. A contract has been let for the Bonds which have been purchased by a syndicate at a favorable interest rate. Bids have been obtained from contractors. Arrangements have been made for a Federal grant to implement the project. This multi-million dollar

project has been seriously jeopardized by your unwarranted action in instituting the aforementioned suit.

As solicitors for the Authority we now advise you of the possible consequences of your action and give you hereby an opportunity to withdraw the "Complaint" and your request for an Injunction, without further expense or embarrassment to you.

All facts requested by your group were explained in detail at well advertised meetings. If, now, notwithstanding the full opportunities afforded your group, you proceed with an action based upon falsehood, and upon spurious, fanciful or frivolous pretexts, the Authority unquestionably will hold you individually and your group jointly responsible in money damages for the resulting losses.

We suggest you consider the total of the following possible losses: (1) Engineering fees to date; (2) Fees of Bond Counsel to date; (3) Fees of local counsel to date; (4) Loss of Federal Grant between $242,000.00 and $250,000.00; (5) Possible increase in the interest rate on a new bond issue; (6) Probable increase in cost of construction on re-bidding of contracts.

This, therefore, is NOTICE to you that should this suit be found to be groundless, frivolous and instituted in bad faith as a malicious abuse of civil process for the mere purpose of embarrassing the Council of the Borough of Pennsburg and the Authority and interfering with the aforesaid contracts and the prospective advantages to be obtained therefrom, we of the Authority will hold you responsible for all damages which may flow from your ill-considered action.

We further urge you to join with that majority in the three boroughs and their duly elected and appointed representatives, to eliminate nuisances and health hazards of many years standing, and in a spirit of progress and public cooperation through the positive program approved and

adopted by your representatives. Your first step can be to withdraw the action that has been instituted.

Very truly yours

RAYMOND PEARLSTINE, WILLARD C. HETZEL and C. EDMUND WELIS,

Solicitors for the
UPPER MONTGOMERY JOINT AUTHORITY

By WILLARD C. HETZEL

Rec'd from officer Moyer 9:25 A.M. Feb. 11, 1960.

L. Yerk & Sweatt

witness—
NEIL SWEATT

APPENDIX C

Original Complaint

The plaintiffs bring this Complaint in Equity against Upper Montgomery Joint Authority, Borough of East Greenville, Borough of Pennsburg and Borough of Red Hill, the defendants, upon a cause of action of which the following is a statement:

1. All of the plaintiffs are citizens and owners of real estate situate within the territories of the Boroughs of East Greenville, Pennsburg and Red Hill, respectively, in Montgomery County, Pennsylvania.

2. The defendant, Upper Montgomery Joint Authority, is a municipal authority incorporated and existing under the Pennsylvania Municipal Authority Act of May 2, 1945, P.L. 382, as amended and supplemented, as so constituted pursuant to ordinances enacted by the Borough Councils of East Greenville, Pennsburg and Red Hill, respectively, in Montgomery County, Pennsylvania.

3. The defendant, the Borough of East Greenville, is a municipal corporation incorporated and existing under the laws of the Commonwealth of Pennsylvania, as a political and governmental subdivision of the Commonwealth of Pennsylvania with legislative and governmental powers within the area of the territory embraced by the boundary lines of the said Borough of East Greenville.

4. The defendant, the Borough of Pennsburg, is a municipal corporation incorporated and existing under the laws of the Commonwealth of Pennsylvania, as a political and governmental subdivision of the Commonwealth of Pennsylvania with legislative and governmental powers within the area of the territory embraced by the boundary lines of the said Borough of Pennsburg.

5. The defendant, the Borough of Red Hill, is a municipal corporation incorporated and existing under the laws of the Commonwealth of Pennsylvania, as a political and governmental subdivision of the Commonwealth of Pennsylvania with legislative and governmental powers within the area of the territory embraced by the boundary lines of the said Borough of Red Hill.

6. By three identical ordinances simultaneously adopted and enacted by the Borough Councils of the Boroughs of East Greenville, Pennsburg and Red Hill, respectively, on March 7, 1960, the said Boroughs approved and entered into an agreement, dated as of March 3, 1960, with the defendant, Upper Montgomery Joint Authority, whereby the Authority covenants to construct a sanitary sewage collection system in and for the aforesaid Boroughs, a sewage treatment plant and other related sewer facilities in and adjacent to and for rendering service in and for the aforesaid Boroughs, and whereby the aforesaid Boroughs each make certain covenants and agreements with respect to the proposed sewer system to be constructed by the Authority, including the enforcement of abutting property owners located in the aforesaid Boroughs to connect

to said sewer system, the granting of certain easements and rights of way to the Authority and other allied matters.

7. Prior to the adoption and enactment of the aforementioned three identical ordinances set forth in paragraph 6 hereinabove, the said Borough Councils of the Boroughs of East Greenville, Pennsburg and Red Hill had also adopted and enacted, simultaneously on February 8, 1960, three identical ordinances by which the said three Borough Councils, respectively, did approve the plan of construction of the proposed sewer system as submitted to them by the Authority, consisting of the plans and specifications and the "Report to the Upper Montgomery Joint Authority, Montgomery County, Pennsylvania, on the Plan to Finance the Construction of the Sanitary Sewer System and Sewage Treatment Plant to Serve the Boroughs of East Greenville, Pennsburg and Red Hill," dated January 25, 1960, as prepared and submitted to the said Authority by their consulting engineers, namely, Albright & Friel, Inc.; and by the said ordinances the said three Borough Councils did also approve the estimated cost of assessable sewers constituting part of the proposed sewer system to be located in each of the said three Boroughs, and the aggregate estimate cost of assessable sewers constituting part of the sewer system to be located in all of the said three Boroughs, and did further approve the proposal of the Authority to charge approximately $866,264 of the total aggregate cost of assessable sewers constituting part of the proposed sewer system against properties benefited, improved and accommodated thereby, as set forth in the above-mentioned Report of Albright & Friel, Inc., by assessment according to the foot front rule.

8. The above mentioned Report of Albright & Friel, Inc., describes the said sewer system as being designed to serve 1534 presently existing dwelling units and states a total estimated cost for the construction and financing of the said sewer system in the amount of $2,592,000 and an esti-

mated average yearly sewer rental per dwelling unit in the amount of $69.40.

9. Long prior to their creation of the defendant Authority, the defendant Boroughs of East Greenville, Pennsburg and Red Hill did by a joint resolution, adopted at a joint meeting of the Borough Councils of the said Three Boroughs on February 24, 1947, did engage and authorize Albright & Friel, Inc., as their Consulting Engineers, to make a preliminary survey, investigation and study for the collection and disposal of sewage from the area of the said three municipalities; and such a survey, investigation and study was thereafter prepared and submitted by Albright & Friel, Inc., to the Borough Councils of the said three Boroughs, in the form of a written Report, under date of July 9, 1947.

10. The said Report of Albright & Friel, Inc., dated July 9, 1947, stated that the said Consulting Engineers had determined that the cost of constructing a joint sanitary sewer system and sewage treatment works for the three municipalities would be $763,000, describing a sewer system to serve 1259 then existing dwelling units in the said three municipalities at an average yearly rental per dwelling unit in the amount of $39.40.

11. The said Albright & Friel, Inc., Report of July 9, 1947, further advised the defendant Borough Councils as follows: "We are momentarily faced with high construction costs. These costs are higher today than at any time in the history of our country. It is, therefore, not advisable for any of the municipalities individually nor the three municipalities jointly, at this time to proceed with the construction of the facilities."

12. Subsequently, in the year 1958, the said Borough Councils of the Boroughs of East Greenville, Pennsburg and Red Hill received from their Consulting Engineers their estimate of the cost of constructing and financing the

proposed sewer system, which was then described as designed to serve 1463 connections, which stated the total estimated cost to be in the amount of $1,950,000, and the estimated average annual cost per connection to be in the amount of $49.95.

13. At a public meeting held in the Pennsburg Civic Building, on Friday evening, February 5, 1960, when the engineer representing Albright & Friel, Inc., was asked to explain the great discrepancy in costs between the proposed sewer system as planned by Albright & Friel, Inc., in 1947, and the sewer system as presently planned by the same Consulting Engineers, he replied that the system proposed in 1947 was designed for 5000 people while the number now proposed to be served is 6000 people, with provisions for expansion, or a 30% increase over the use originally contemplated in the 1947 Report. If, in fact, a 30% increase in the estimated use and service of the proposed sewer system between 1947 and 1960 were the only factor involved, then the estimated cost of construction of the said sewer system should have increased from the quoted figure of $763,000 in 1947 to approximately $991,900 in 1960. No other facts which could reasonably explain the additional substantial increase in total cost to the estimated figure of $2,592,000 as set forth in the Albright & Friel, Inc., Report of January 25, 1960, have been stated by the defendants or by their Consulting Engineers.

14. The plaintiffs have themselves engaged the services of a firm of professional Consulting Engineers, namely Tumarkin, Morgan & Emerman, of New York City, New York, for the purpose of making an investigation and study of the plans and specifications and Report of January 25, 1960, prepared by Albright & Friel, Inc., pertaining to the proposed sewer system; and after making such investigation and study their Consulting Engineers have advised the plaintiffs that in their professional opinion:

(a) the proposed sewer system project as described in the Albright & Friel, Inc., plans and specifications and Report of January 25, 1960, is not economically feasible;

(b) the said sanitary sewer system as so proposed is not a complete sewer system for each of the said three Boroughs;

(c) the alleged nuisance of sewage discharge into the waters of the Commonwealth of Pennsylvania will only be partially abated by the construction and operation of the proposed sewer system;

(d) The construction and financing of the said sewer system as proposed would place an unnecessary and unjustifiable burden upon the majority of the taxpayers and property owners of the said three Boroughs for the benefit of a relatively few persons whose sewage may have been polluting the waters of the Commonwealth.

(e) a third pumping station which is proposed to be constructed three years hence will require additional sewer systems, pumping equipment, interceptor sewers and force mains which are not economically feasible at the present time and cannot be made economically feasible within three years from the present time.

(f) the average yearly income of the average property owner in the said three Boroughs (estimated at approximately $3800 per year) is insufficient to sustain the immediate and continuing burden of financing the said sewer system as proposed with an initial expense by way of assessment to each such property owner in an average amount of approximately $1,000, in addition to which an annual minimum sewer rental in the average amount of $69.40 per dwelling unit would be imposed upon each of the families having properties within the areas of the said three Boroughs to be served by the proposed sewer system, all of which would be an unjustifiable financial hard-

ship upon the said property owners and would not be economically feasible.

15. When the plaintiffs and other interested property owners and tax payers in the said three Boroughs attempted to bring to the attention of the defendants the glaring discrepancies in estimated costs between the aforementioned Engineers' Reports of 1947, 1958 and 1960, and to obtain reconsideration by the defendants of their approval of the Albright & Friel, Inc., Report of January 25, 1960, and consideration of other preferable and less expensive alternatives for the abatement of any alleged sewage discharge in the waters of the Commonwealth, the defendants insisted that all investigation be put aside and that the sewer system as proposed in the Albright & Friel, Inc., Report of January 25, 1960, be immediately and arbitrarily approved, even to the extent that the defendant Upper Montgomery Joint Authority, through its solicitors, delivered threatening and intimidating letters to the plaintiffs and other taxpayers and property owners, by which the plaintiffs were warned and threatened by the defendant Upper Montgomery Joint Authority that, if they should proceed with legal action against the said defendant, the said defendant would hold them individually and jointly responsible in substantial money damages.

16. The defendant Authority has obtained bids for the sale of its bonds for the financing of its proposed sewer system project, is now about to sell its bonds or has sold them and is about to award contracts for the construction of the said sewer system or a part thereof.

17. By so acting under the circumstances and in the manner described hereinabove, the defendants have been guilty of a manifest abuse of the legal discretion vested in them by the Laws of the Commonwealth of Pennsylvania, and they have acted arbitrarily, unreasonably, capriciously and not in good faith, so that their decisions

and actions as above described have been and are of an unlawful nature and such as should be equitably restrained.

18. Unless the defendants are now restrained and enjoined from proceeding with the financing and construction of the proposed sewer system, the plaintiffs will suffer immediate, severe and irreparable damage.

WHEREFORE, plaintiffs respectfully pray your Honorable Court to enter a decree enjoining the defendants, Upper Montgomery Joint Authority, Borough of East Greenville, Borough of Pennsburg and Borough of Red Hill, perpetually, from:

1. Issuing and selling any revenue bonds for the financing of the said proposed sewer system.

2. Accepting or using any monies granted by the government of the United States of America or by the Commonwealth of Pennsylvania for use in connection with the construction, operation and financing of any part of said sewer system.

3. Instituting any condemnation proceedings for the acquisition of property or easements in connection with the proposed construction of the said sewer system or any part thereof.

4. Proceeding with any work or excavation or construction or the awarding of any contract of any kind for any such work in connection with the establishment and operation of the said proposed sewer system.

5. Levying any assessment for any part of the cost of construction or operation of the said proposed sewer system against any properties hereafter to be benefited, improved or accommodated thereby.

The plaintiffs for such equitable relief as may appear to your Honorable Court as necessary and appropriate.

APPENDIX D

TUMARKIN, MORGAN & EMERMAN
Consulting Engineers
140 Nassau Street, New York 38, N. Y.

Tel. REctor 2-7544
Investigations
Reports
Design
Supervision

Irwin Emerman, P. E.
Egbert P. Morgan, P. E.

March 31, 1960

Tri-Boro Citizens Committee
Pennsburg, Penna.

Att: Mr. Charles Weyand, Chairman

Re: Sewage System—Upper Montgomery Authority

Reference: Our Preliminary Report of March 9, 1960

Gentlemen:

1. The recent decisions of the Councils of East Greenville and Pennsburg to install two sets of sewers in alleys parallel to and in lieu of one sewer in Main Street aggravates the present situation and is further proof that this project is not economically feasible. The drawings do not indicate that test pits and/or borings were taken along the center line of the proposed sewer. According to the plans and the report, there are approximately 120,000 linear feet of sewer pipe and a primary and secondary treatment plant, designed for 6,000 people. Under today's high prices, not including rock excavation, the average cost for this size sewer system is $50,000.00 per mile plus $300,000.00 for the cost of one primary and secondary sewage treatment plant, including interceptor sewers; and the cost of the overall sewer system with two pumping stations should be approximately $1,500,000.00.

2. We have been advised that of the 4,800 persons, who would use the project, 600 are retired on Social Security or are widows living on pensions and can ill afford to pay for their share of this expensive project.

3. The sanitary sewer system, as proposed, is not a complete system for each Borough. Annexed hereto and made part of this report are plans of each Borough, showing those homes and other buildings that will not connect to the proposed sewers. This permits taxpayers in the Boroughs, not abutting on the sewer lines, to dispose of their sewage cheaply. The schools which have their own sewage disposal system, and even those, abutting on the sewers, are not included for connection or the sewers are not carried close enough to homes in order to connect. This prevents large sewer rentals and assessments from being included, which would be a saving to abutting taxpayers. The failure to include and to design for all homes and buildings in the Boroughs prevents this from being a complete system for each Borough.

4. The sewage disposal into the waters of the Commonwealth will be only partially abated. The drawings annexed hereto indicate that 212 homes situated in the three Boroughs and in the surrounding watershed area will not be connected and there are no extensions proposed with the exception of one for 13 homes to be connected to the sewer system sometime in the future. This means that over 16% of the homes, which may be polluting the watershed streams, will not be connected and therefore, would not be abating and possibly continuing the nuisance.

5. The majority of the taxpayers, abutting the new sewer lines will be paying for a sewer system required to abate a nuisance created by a minority of taxpayers abutting existing sewers. It would be quite expensive for the few taxpayers involved to abate the nuisance and to construct the necessary disposal plant because of the cost of land to accommodate the plant and the plant itself. However,

there is no less expensive way to abate a major nuisance than to assess all taxpayers and to require their connection to a sewer system constructed for the benefit of a minority.

6. The decisions of the Boroughs of Pennsburg and East Greenville to rescind previous resolutions for a one pipe system on Main Street in favor of a twin parallel system in alleys will add further to the costs. The cost to the taxpayers has shown a sharp increase due to doubling the linear feet of pipe required. Economy, at present can best be realized by considering a design for 6,000 people for twenty years with two small disposal plants and one pumping station. The lineal feet of pipe can be reduced in solving the present abatement with the use of settling tanks, cesspools and/or septic tanks, et or isolated houses and farms. This will deduct fu r from the present burden to be placed upon the taxpayers.

Respectfully submitted,

TUMARKIN, MORGAN & EMERMAN

By EGBERT P. MORGAN
Egbert P. Morgan P. E.

EPM:ms

APPENDIX E

Pertinent Excerpts of Statute Involved

Purdon's Penna. Statutes Annotated, Title 53

§ 306. Purposes and powers; general

A. • • • • •

B. • • • • •

(a) • • • • •

(i) To borrow money, make and issue negotiable notes, bonds, refunding bonds, and other evidences of indebtedness or obligations (herein called "bonds") of the Authority, said bonds to have a maturity date not longer than forty years from the date of issue, except that no refunding bonds shall have a maturity date later than the life of the Authority, and to secure the payment of such bonds or any part thereof by pledge or deed of trust of all or any of its revenues and receipts, and to make such agreements with the purchasers or holders of such bonds, or with others in connection with any such bonds, whether issued or to be issued, as the Authority shall deem advisable, and in general to provide for the security for said bonds and the rights of the holders thereof, and in respect to any project constructed and operated under agreement with any Authority or any public Authority of any adjoining state, to borrow money and issue such notes, bonds and other evidences of indebtedness and obligations jointly with any such Authority.

• • • • •

§ 307. Purposes and powers; bonds

A. The bonds of any Authority hereinabove referred to and authorized to be issued, shall be authorized by resolution of the board thereof . . .

• • • • •